

COURT OF APPEALS
DIVISION TWO
OF THE STATE OF WASHINGTON

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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

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STATE OF WASHINGTON)

Respondent,)

v.)

MICHAEL RICHIE)

No. 48869-8-II

STATEMENT OF ADDITIONAL
GROUNDS FOR REVIEW

I, Michael Richie, have received and reviewed the opening brief prepared by my attorney. Summarized below is the additional grounds for review that are not addressed in that brief. I understand the Court will review this Statement of Additional Grounds for review when my appeal is considered on the merits.

Additional Ground 1

The prejudice resulting from the instructional error was magnified by the prosecutor's improper statement of the law and denigration of defense counsel during closing arguments.

Prosecutors have the duty to see that those accused of a crime receive a fair trial. State v. Charlton, 90 Wn.2d 657, 664-65, 585 P.2d 142 (1978). When the prosecutor mischaracterizes the law and there is a substantial likelihood that the misstatement affected the jury verdict, the defendant is denied a fair trial. State v. Gotcher, 52 Wn. App. 350, 355, 759 P.2d 1216 (1988). A prosecutor's misstatement of the law is a serious irregularity having the grave potential to mislead the jury. Davenport, 100 Wn.2d at 764.

It is also "improper for the prosecutor to disparagingly comment on defense counsel's role or impugn the defense lawyer's integrity." State v. Thorgerson, 172 Wn.2d 438, 451, 258 P.3d 43 (2011). Comments that permit the jury "to nurture suspicions about defense counsel's integrity" can deny a defendant's right to effective representation. State v. Neslund, 50 Wn. App. 531, 562, 749 P.2d 725 (1988).

When discussing the robbery to-convict instruction, the prosecutor told the jury:

"Now, one of the issues - again, going back to reasonable doubt. What about Kersten Gouveia not being on duty that night? How does that play with the elements of the crime? Well, let's go back through the elements and see - let's change it from person or presence of another customer, say or bystander, say, or just good samaritan, say. Has the defendant not committed each element of this crime even if that describes who Kersten Gouveia is? The answer's yes, ... The theft doesn't have to be from the owner. Who's the owner of the bottles of liquor in this case? Well, it's Walgreen's Corporation.... And that last sentence makes it abundantly clear that ownership of the property taken must be in some person or persons who commit the theft. In other words, the owner has to be someone other than the defendant, and it was."

(RP 544) As discussed above, this is legally incorrect. It is not enough to simply prove that the property belonged to someone other than Richie, or to simply prove that the property was taken from or in the presence of a customer or bystander or good samaritan. The State had to prove that the person from whom the liquor bottles were taken was the owner or a representative of the owner, or that the person had actual possession or a superior interest in the liquor bottles. Hall, 54 Wn. At 143-44; Latham, Wn. App. at 864-66.

During closing arguments, Richie's counsel tried to argue his theory of the case:

*"The jury instructions certainly infer is that what [the State] has to show is that the victim of the robbery had to have a proprietary or superior interest in the property, okay, than to Mr. Richie is an issue of fact that you need to decide." (RP 557)

- * "There is nothing to indicate that Ms. Gouveia had a superior or proprietary interest. She was off the clock. She wasn't on duty. We didn't hear any testimony about their duties with regard to the store when they're not on the clock. . . So we don't have a robbery[.]" (RP 558-59)
- * "What we're here today to do, you folks are here today to do, is decide whether the State has proven beyond a reasonable doubt that Mr. Richie violated the laws that he's charged with violating. And please, if you remember anything, remember that the State needed to show that she had a proprietary or superior interest in the property being taken." (RP 560-61)
- * "In this particular case, the huge flaw in their case was the fact that they are unable to demonstrate that Ms. Gouveia had a superior or proprietary interest in the property. We heard nothing from anyone that off-duty employees are charged with protecting Walgreens' merchandise. You know, the State makes a point of, well, Walgreens, you know, it's their property. I mean, but that's not the issue, okay. You have to have a superior interest in the property, and there was no testimony, you know, what these folks were charged with doing by Walgreens when they're off duty. I submit to you that's an absence of proof, and it severely undermines the State's case. (RP 562-63)
- * "So there is no reason for him to know that Ms. Gouveia was an employee at the store. As a matter of fact, there's lots of reasons to the contrary, right? She strolls into the store moments before he does. She goes and purchases something. She's paying for it at the register like a patron would, okay. She has no - there's no evidence that she had a proprietary or superior interest in the property." (RP 564)

Defense counsel gave the jury a correct statement of the law, 5
and urged the jury to consider the facts in light of this law when
deciding whether Richie was guilty or not guilty of robbery.

When the prosecutor gave his rebuttal closing argument, he
stated:

- * "The jury instruction that you have are not on a computer, so you can't do a word search to look for the word 'proprietary' or the word 'superior' but no matter how many times you look through them, you won't find them in the jury instructions". (RP 568)
- * "When the defense attorney writes up here 'proprietary' and 'superior interest', what he's telling you is what you should do in order to give the defendant a fair trial is ignore the law." (RP 568)
- * "What the defense attorney is arguing to you is, please go to the robbery instruction - and, actually both robbery instructions - and at the end of those clauses, please write in for yourselves the word "proprietary" or the word 'superior interest'. Add that into the instructions and then deliberate. That's what the defense attorney was arguing to you." (RP 569)
- * "There's nothing in the instruction that tells you that matters one way or the other, except the defense attorney would like you to just go up there and write it in for him. Don't do that." (RP 570)
- * "Use the law that's given to you, and the law that's given to you is exactly what's printed in instruction No. 6 and instruction No. 8. And instruction No. 8 says that explicitly. Ownership of the property taken must be in some person other than the person or persons who took it. The defendant had no ownership interest in that property. A bystander can intervene in a robbery and still be a victim of a robbery." (RP 570-71) "If the guy's stealing something that doesn't belong to him, a good samaritan . . . Good samaritans can intervene in a robbery and be the victim of a robbery." (RP 571)
- * "So the last thing I say to you is, don't do what the defense attorney is inviting you to do, which is write words in to the instructions, Use the instructions that the Court has given to you. Use the evidence that has been presented to you. Decide the case on what the law is, not what you wish it were, not what the defense attorney wishes it was." (RP 573-74)

Defense counsel objected repeatedly at the time, but all objections were overruled. (RP 568, 569, 570) Defense counsel later moved for a mistrial, and in the alternative sought to cure the error by requesting that the jury be given a supplemental instruction fully and correctly explaining the law. (RP 578-79, 588-89, CP 36-39) Both request were denied. (RP 580, 594-95)

But Richie was entitled to relief because the conduct was both improper and prejudicial. The prosecutor not only misstated the law repeatedly when he told the jury that there was no need to show a proprietary or superior interest in the liquor bottles, but he also wrongfully accused defense counsel of trying to mislead the jury or talk the jury into ignoring the law. These arguments severely undermine defense counsel's credibility and integrity with the jury, and undercut Richie's entire case, The trial court abused its discretion when it allowed such misconduct to occur, and when it failed to grant any relief when Richie timely and repeatedly requested it.

Thus, it cannot be said that the trial court's error and the prosecutor's misconduct had no effect on the outcome of the trial. Accordingly, Richie's Assault in the Second Degree conviction must be reversed.

Date: 9-22-2016

Signature: Michael Richie